isolated act of disobedience of a lawful order. It challenged and rejected the whole fabric of the relationship of employer and employee and effectively destroyed the trust which must subsist in any such relationship where the employee holds a responsible position. In this connection the case of *Sinclair* v. *Neighbour* (2) seems to me to declare a principle which is relevant in this case. I find myself in complete agreement with the views of the learned judge in the court below and I would accordingly dismiss this appeal with costs both in this court and in the court below.

Azmi C.J. (Malaya) and **MacIntyre F.J.** concurred.

Appeal dismissed.

Solicitors: *S. Seenivasagam & Sons; Shearn, Delamore & Co.*

YEO KIM KUAN v. HAMID

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) and McIntyre F.J.) August 27, 1968]

[K.L. — Federal Court Appeal No. X. 74 of 1967]

Damages — Personal injuries — Plaintiff dying after delivery of judgment — Application to recall judgment — Appeal against post-dated judgment — Whether out of time — Federal Court (Transitional) Rules, 1963.

Practice and Procedure — Post-dating of judgment — Discretion under R.S.C. 1957, O. 41 r. 3 — Whether judicially exercised.

This was an appeal against the judgment of Ismail Khan J. reported at [1966] 1 M.L.J. 129. After the delivery of the judgment the plaintiff succumbed to his injuries from the accident and died. An application was made for the recall of the judgment and after hearing the parties an order was made by consent for the original judgment to be restored. The learned judge subsequently ordered that the original judgment should be post-dated to July 15, 1967. An appeal was lodged against the order post-dated judgment within one month from July 15, 1967.

Held, allowing the appeal: (1) the appeal was brought within the time prescribed by rule 13 of the Federal Court (Transitional) Rules, 1963. The recalling of the judgment must operate in effect as a recall of the pronouncement itself otherwise there was the possibility of absurd situation arising;

(2) in post-dating the judgment the learned trial judge had not exercised his discretion under O. 41 r. 3 judicially;

(3) in this case as the plaintiff had died: (i) the amount for loss of future earnings must be set aside; (ii) the amount for loss of amenities must be limited to the period when the plaintiff was alive;

(4) on the facts the plaintiff was guilty of contributory negligence to the extent of 25%;

(5) the damages should be reduced from $113,845 to $16,732.50 being a sum of $13,383.75 as general damages and $3,348.75 as special damages.

Cases referred to:—

(1) *Turner* v. *London and South Western Railway Company* L.R. 17 Eq. Cas. 561.

(2) *Winkey* v. *Winkey* 44 L.T.R. 572.

(3) *Luby* v. *New Castle-under-Lyme Corporation* [1965] 1 Q.B. 214.

(4) *Davis* v. *Swan Motor Company* [1949] 2 K.B. 291.

(5) *Nance* v. *British Columbia Electric Railway Company Ltd.* [1951] A.C. 601, 612.

(6) *Flint* v. *Lovell* [1935] 1 K.B. 354.

(7) *Rose* v. *Ford* [1937] A.C. 826.

(8) *Harris* v. *Bright Asphalt Contractors Ltd.* [1953] 1 Q.B. 617.

(9) *Wise* v. *Kaye & Anor.* [1962] 1 Q.B. 638.

(10) *West* v. *Shepherd* [1964] A.C. 326, 348 & 349.

(11) *Andrews* v. *Freeborough* [1966] 3 W.L.R. 342.

(12) *Forrest* v. *Sharp* (1963), 107 Sol.J. 536.

(13) *Quek Poh Ser & Anor.* v. *Jhagir Singh* [1962] M.L.J. lxxxviii.

(14) *Mohamed Ikhawan* v. *Johar & Anor.* [1966] 1 M.L.J. 5.

FEDERAL COURT.

Peter Mooney (*Edgar Joseph Jr.* with him) for the appellant.

T. W. Ong (*J. C. Chen* with him) for the respondent.

Cur. Adv. Vult.

MacIntyre F.J.: This is an appeal against the judgment of Ismail Khan J., in a running down case in which the plaintiff, an infant, aged 20, was knocked down and injured on the 19th of March, 1964, while crossing Jalan Bunga Raya, Malacca, by a motor car driven by the appellant. The plaintiff sustained a fracture of the cervical vertebra, resulting in permanent paralysis of both forearms, hands, trunk muscles and muscles of the lower limbs with complete loss of control over bladder and rectum. According to the medical expert who gave evidence at the trial on the 12th of August 1965, the plaintiff's life expectancy had, in consequence of the injuries sustained, been reduced from 66 years to between 40 and 45 years with every prospect of an earlier death through infection of bladder and kidney or from pneumonia.

The plaintiff, however, succumbed to infection on the 27th of October 1965, that is to say, five days after the delivery of judgment awarding him damages in the sum of $113,845, of which $110,000 was for general damages and $3,845 for special damages.

The appellant then moved the court to recall its judgment delivered on the 22nd of October, in order to alter, vary or modify the amount awarded as general damages. Upon the hearing of the application on the 15th of November, 1965 the learned trial judge made an order by consent recalling his judgment with liberty to the parties to address him. Then about a year later, on the 5th of November, 1966, the present

respondents, who had in the meantime obtained letters of administration and an order adding themselves as parties to the suit in place of the deceased plaintiff, successfully moved the court to set aside the order recalling the judgment on the ground that the former counsel who had consented to the order had no authority to do so. However, the appellant also moved the court on the same day to recall the restored judgment and the court obliged by recalling it once again with liberty to the parties to address later.

The motion came up for final disposal on the 15th of July 1967 when an order was made by consent restoring the judgment unconditionally. It then became necessary to draft two orders, one in respect of the order restoring the judgment and the other in respect of the judgment itself which as yet had not been drawn and perfected. The parties soon found themselves in disagreement in regard to the terms agreed upon in respect of the consent order made restoring the judgment and the matter was referred to the judge in chambers on the 22nd of August 1967 to settle the terms. After hearing the submissions of the respective counsel, he ordered that the original judgment should be dated the 15th of July, 1967, notwithstanding the fact that it had been pronounced in open court on the 22nd of October 1965 and directed that the names of the respondents should also appear in the title as the plaintiffs. The order were accordingly drawn up and perfected.

The appellant then filed the notice in respect of the present appeal on the 12th of August 1967, appealing against the whole of the judgment. He also gave notice of his intention to apply for leave to adduce fresh evidence regarding the date of the death of the deceased plaintiff. The respondents, thereupon, filed a notice of cross-appeal dated the 2nd of October 1967.

The appeal and cross-appeal came up for hearing before us on the 19th of June when the respondents admitted that the deceased plaintiff died on the 27th of October 1965. However, each party, objected to the hearing of the appeal brought by the other, on the ground that the respective notices of appeal had been filed out of time. The time prescribed by the provisions of rule 13 of the Federal Court (Transitional) Rules, 1963 is one month from the date of the pronouncement of the order or judgment appealed against. After hearing the submission of counsel, we decided to postpone our decision in regard to the objection taken by the respondents until after hearing the appeal on its merits, but decided to sustain the objection in respect of the so called cross-appeal which is in our opinion not a cross-appeal but an appeal against the order made on motion on the 15th of July, 1967 and settled in chambers on the 22nd of August, whereby it was ordered, *inter alia*, that the original judgment should be dated the 15th of July 1967 instead of the 22nd of October, 1965. The notice of appeal was clearly out of time and we, therefore, dismissed it with costs. Having then heard the arguments of counsel on the merits of the appeal, we reserved our judgment.

I have now, rather reluctantly, come to the conclusion that this appeal had been brought within the time prescribed by rule 13 of the Federal Court (Transitional) Rules. I think that the recalling of a judgment must operate in effect as a recall of the pronouncement itself. To hold otherwise would be to ignore the possibility of an absurd situation arising. After the judgment was recalled, the appellant could not have complied with rule 13 as there was no judgment to appeal against, nor could he have complied with rule 7 which requires the notice to be served on the respondent when filing it as the plaintiff in this case had died 5 days after the delivery of judgment. However, I am not at all sure that the learned judge in post-dating the judgment under Order 41 rules 3 of the Rules of the Supreme Court, had exercised his discretion correctly. Order 41 rule 3 reads as follows:—

> "Where any judgment is pronounced by the court or a judge in court, the entry of the judgment shall be dated as the day on which such judgment is pronounced, unless the court or judge shall otherwise order, and the judgment shall take effect from that date: provided that by special leave of the court or a judge a judgment may be ante-dated or post-dated."

Three cases were cited to us, in which special leave was granted to ante-date or post-date a judgment. In *Turner* v. *London and South Western Railway Company*,[1] where the plaintiff had died after the hearing but before the date of judgment, it was held that the court had jurisdiction to ante-date the judgment as of the date of hearing. In the other two cases, namely, *Winkey* v. *Winkey*,[2] and *Luby* v. *New Castle-under-Lyme Corporation*,[3] the judgments were post-dated to conform to the pleadings which were amended later. No such problem had arisen in the instant case. It would seem but reasonable that when a judgment is restored after being recalled, it should be restored as it was pronounced in open court. It would appear from the submission of counsel for the appellant that the judgment was post-dated in the interest of justice, as otherwise, the appellant would have been out of time to file a notice of appeal. With respect, I cannot conceive of any injustice arising had the judgment been restored as originally pronounced. The appellant could have applied for special leave under rule 13 to bring the appeal out of time. The jurisdiction to extend time is a jurisdiction which is expressly conferred upon the Federal Court and, therefore, I am inclined to think, that in post-

dating the judgment the learned trial judge had not exercised his discretion judicially.

However, as matters now stand, the appeal is against a judgment which was restored on the 15th of July 1967 by consent "as from this date". That order has not been set aside. There can be no appeal from a consent order. But, if, as contended by counsel for the respondents, the order should be read as if the consent was only for the restoration of the judgment and not as to the date of its effectiveness, then he cannot be heard on that point, since the respondents' notice of appeal had been filed out of time and the special leave of this court had not been obtained. Their preliminary objection must, therefore, fail.

In regard to the appeal on its merit, Mr. Mooney for the appellants submitted that the learned trial judge had failed to decide the question of contributory negligence though pleaded, and that, in any event, the assessment of damages was excessive partly because the award contained an element of damage for loss of future earnings based on the assumption that the plaintiff would live for 20 to 25 years; and partly because the greater part of the award was in respect of loss of amenities also based on a life expectancy as aforesaid.

The facts of the case are simple. The accident took place in broad daylight on a one-way traffic street. The plaintiff was knocked down when crossing the street. The flow of traffic was from his right to left. According to his evidence he looked to his right before he started to cross the road but not afterwards. Before he started to cross he did not see any vehicle approaching from up to a distance of about 95 feet where there is a round-about.

What amounts to contributory negligence is stated succintly by Bucknill J. in his judgment in *Davis* v. *Swan Motor Company.*[4] He says at page 308, "when one is considering the question of contributory negligence, it is not necessary to show that the negligence constituted a breach of duty to the defendant. It is sufficient to show lack of reasonable care by the plaintiff for his own safety." The decision in *Davis* v. *Swan Motor Company, supra,* was approved by the Privy Council in *Nance* v. *British Columbia Electric Railway Company Ltd.,*[5] and in the course of the judgment delivered by Viscount Simon he said: "The plea that the deceased was guilty of contributory negligence is wide enough to cover the contention that he was careless of his own safety, even though he did not owe a duty to the respondent company to be careful. It is perhaps unfortunate that the phrase 'contributory negligence' uses the word 'negligence' in a sense somewhat different from that which the latter word would bear when negligence is the cause of the action."

It is quite clear from the evidence in the present case that the plaintiff on his own admission showed an utter disregard for his own safety when from the moment he stepped off the curb to cross the street up to the moment of the collision he was not aware of the approach of any vehicle. He was therefore guilty of contributory negligence. Mr. Mooney suggested that the proportion of his contribution should be 25%, and I think it would be a fair proportion in the circumstances of this case.

In regard to the assessment of general damages the learned trial judge says in his grounds of judgment:—

> "In arriving at an estimate there are factors which have to be taken into account which cannot be assessed in terms of money. The plaintiff has to be compensated somehow for the loss of amenities of life during his remaining life expectancy. Taking all the relevant matters into consideration, I think that a sum of $110,000 would be an appropriate figure for general damages being a sum of $70,000 for loss of amenities and $40,000 for loss of earnings."

It is clear from the authorities, that the elements of damage to be considered in assessing general damages in respect of a claim by a living plaintiff are: (1) loss of expectation of life; (2) loss of future earnings; (3) pain and suffering and (4) loss of amenities of life. In regard to the first item, the Court of Appeal in *Flint* v. *Lovell* [6] decided that damages arising out of the loss of expectation of life ought to be allowed for as an independent head of damage where the claim is brought by a living plaintiff. This principle was affirmed by the House of Lords in *Rose* v. *Ford* [7] which also held that where a cause of action for loss of expectation of life had vested in a deceased person before his death the cause of action would then pass on to his estate under section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934. That section is in *pari materia* with section 8(1) of our Civil Law Ordinance, 1956. In regard to the second item, it was held in *Harris* v. *Bright Asphalt Contractors Ltd.,*[8] that the loss of future earnings should be assessed only in respect of the plaintiff's shortened period of life as a result of the injuries sustained but not up to the end of the period of his normal expectation of life. This principle was followed by the Court of Appeal in *Wise* v. *Kaye & Anor.*[9] It was also held in *Harris* v. *Bright Asphalt Contractors Ltd., supra,* that when a cause of action for loss of future earnings survived to the estate of a deceased person, the claim merged with the claim for loss of expectation of life and could not be claimed separately. In regard to item three, namely, pain and suffering, Lord Morris in *West* v. *Shephard* [10] says and I quote:

> ". . . damages are designed to compensate for such result as have actually been caused. If someone has been caused pain then damages to compensate for the

enduring of it may be awarded. If, however, by reason of an injury someone is made unconscious either for a short or for a prolonged period with the result that he does not feel the pain then he needs no monetary compensation in respect of pain because he will have not suffered it. Apart from actual physical pain it may often be that some physical injury causes distress or fear or anxiety. If, for example, injuries include the loss of a leg there may be much physical suffering, there will be the actual loss of the leg (a loss the gravity of which will depend upon the particular circumstances of the particular case) and there may be (depending upon particular circumstances) elements of consequential worry and anxiety. One part of the affliction (again depending upon the particular circumstances) may be an inevitable and constant awareness of the deprivations which the loss of leg entails. These are all the matters which judges take into account. In this connection also the length of the period of life during which the deprivations will continue will be a relevant factor."

Besides the two aspects of pain and suffering referred by Lord Morris, the deprivation of a limb, organ or faculty diminishes the full enjoyment of the pleasure of living which is often referred to as loss of amenities. In his dissenting judgment in *West* v. *Shephard, supra,* Lord Devlin says:—

"There are two ways in which the loss of enjoyment can be considered. It can be said that from beginning to end it is really all mental suffering . . . If this is the true view then total unconsciousness as in *Wise* v. *Kaye & Anor., supra,* relieves all mental suffering and nothing can be recovered for a deprivation which is not being experienced."

"The other way to look upon the deprivation of a limb is as a loss of a personal assets, something in the nature of a property. A limb can be put both to a profitable use and to a pleasurable use. In so far as it is put to a profitable use, the loss is compensated for by calculating loss of earnings and not by assessing mental pain. On the same principle, it can be said, a sum must be assessed for loss of pleasurable use irrespective of whether there is mental suffering or not."

He then goes on to say:—

"As might be expected, English law has not come firmly is favour of either of these two ways to the exclusion of the other. It favours a compound of both. . ."

Lord Pearce, in the same appeal, makes an observation which I think is relevant to the present case. He says and I quote:—

"The fact that damages can give no benefit or satisfaction to the injured man and can only go to those who inherit the dead man's estate would not be a good reason for withholding damages which are legally due."

In this connection the decision of the Court of Appeal in *Andrews* v. *Freeborough* (11) is also relevant. Willmer L.J. in his judgment said:—

"In face of these authorities I think we are bound to hold that this child, notwithstanding that she remained unconscious, would have been entitled, had she lived, and the plaintiff as her personal representative is now entitled, to recover, in addition to damages for loss of expectation of life, substantial damages in respect of the injuries sustained, resulting as they did in the total loss of all amenities of life during the period of one year while the child remained alive."

The general damages awarded was £2,000.

In the case of *Wise* v. *Kaye & Anor., supra,* the court:—

"Approved an award of £15,000 as general damages to a young woman of twenty who had sustained brain injury rendering her completely helpless and unconscious beyond hope of recovery. It was held that the fact of the plaintiff being ignorant of the loss suffered was irrelevant, except as an element in the assessment of damages for pain and suffering." (*per* Willmer J. in *Andrews* v. *Freeborough*).

The plaintiff in *West* v. *Shephard, supra,* was a woman aged 41 who as a result of the injuries sustained suffered from cerebral atrophy and paralysis of all four limbs. She was unable to speak but could recognise relatives and the nursing staff and communicated by movements of the eyes, face and her right hand. Her life expectation had been reduced to five years and she was probably aware of the seriousness of her condition. The court awarded general damages in the sum of £17,500 of which £2,500 was for the suffering caused to the plaintiff by her partial appreciation of her state and £15,000 as the proper sum as awarded as in *Wise* v. *Kaye & Anor., supra,* for a person who was completely unconscious. It would, therefore, appear that where all other things are equal, the more conscious an injured plaintiff is of his condition the greater must be the amount of damages to be awarded. On this point, Marshall J. is reported in the *Solicitors' Journal* of the 5th of July, 1963, Vol. 107, page 536 to have observed in his judgment in *Forrest* v. *Sharp* (12) that *West* v. *Shephard, supra,* had:—

"Laid great stress on and gave clear authority to the courts to take into account whether the person injured knew or did not know of the condition and likely future consequences. His view was that it was always a matter which had really been taken into account by judges, and he did not propose to deal with that as a separate heading and figure but would take it *inter alia* into account in the figure of general damages, which were assessed at £16,000."

In the present appeal, I think, that the most convenient approach to the problem of re-assessing general damages will be to first ascertain whether the award made is reasonable in the circumstances then prevailing and then to consider the extent of the reduction to be made in view of the death of the plaintiff about 19 months after the accident, taking into account any other claim which may have since accrued to the estate of the deceased plaintiff.

Counsel for the respondent contended that the award made was inadequate because the learned trial judge did not take into consideration damages for loss of expectation of life, which a living plaintiff was also entitled to claim and also damages arising out of anxiety and worry due to the plaintiff's knowledge of the shortening of his life expectancy. Loss of ex-

pectation of life as an element of damage does not fall within the category of loss of amenities and there appears to be, therefore, some substance in counsel's argument. But as for the second point, worry and anxiety, are part and parcel of pain and suffering, and there is no reason to believe that the learned trial judge did not consider that factor in assessing damages for loss of amenities. However, I do not think that counsel is entitled to raise these points, since the respondents had not cross-appealed against the judgment in respect of quantum or otherwise.

Now to apply the principles followed by the English courts. The learned trial judge awarded $40,000 on the 22nd of October, 1965 for loss of future earnings. He was right in making an award for future earnings as the plaintiff was then alive. He died five days later. In the circumstances it is not necessary now to consider whether the award was assessed on correct principles or not. As from the date of his death, that is, on the 27th of October 1965 that item or claim passed on to his estate as an element of damage for loss of expectation of life. The maximum conventional sum under that item judicially recognised in this country is $3,500. The award of $40,000 for loss of future earnings must, therefore, be set aside.

There remains the award of $70,000 for loss of amenities, which must be deemed to include compensation for pain and suffering. The assessment was based on the following facts, namely:—

(1) The plaintiff at the time of the accident was a young man of 20 years of age;

(2) He was in good health with a good record in athletics and studies;

(3) He was a student teacher with promise of a successful career;

(4) That his expectation of life had been reduced to 20 to 25 years; and

(5) The disabilities arising out of his injuries were both serious and permanent.

There can be no doubt that in this case the mental anxiety and worry endured by the plaintiff must have been of a high order and perhaps greater than that of the plaintiff in *West* v *Shephard*. The plaintiff was present in court and gave evidence regarding his hopeless condition. In regard to the loss of amenities he was faced with the problem of employing an attendant to attend to his toilet needs whereas in *West* v. *Shephard*, the cost of nursing, hospitalisation and medication was borne by the National Health Service at the expense of the tax payer. This fact appears in the judgment of Devlin L.J. Again in the instant case, the learned trial judge relied on the assessment of damages in *Quek Poh Ser & Anor.* v. *Jhagir Singh*,[13] as a comparable case. The facts are similar. The plaintiff there was awarded by Buttrose J. a sum of $35,000 for loss of future earnings and $65,000 for loss of amenities. The award of $70,000 for loss of amenities in this case, if converted into English pounds in 1965 would have produced about £8,235. Having regard to the higher cost of living in the United Kingdom, Ong Hock Thye F.J., in *Mohamed Ikhawan* v. *Johar & Anor.*,[14] estimated that the equivalent sum in terms of money value here of an award made in England would be two-thirds of that amount. It is an estimate with which, I concur, with respect. On that basis, $70,000 would be equivalent of an award of £10,980 in England. On the authorities, I would regard such an award in England on the facts of the instant case, as a very conservative estimate of the damages suffered. The award of $70,000 is, therefore, not an over estimate and since the respondents had not cross-appealed against quantum the assessment must stand.

The amount awarded is an award to compensate for the loss of amenities during the plaintiff's remaining life expectancy. According to the evidence,, he was expected to live for another 20 to 25 years from the date of the accident. That does not, however, mean that the learned trial judge assessed the loss of amenities on the basis of a life expectation of 20 to 25 years. In *Quek Poh Ser & Anor.* v. *Jhagir Singh, supra*,, the assessment was made on a life expectancy of some 10 to 15 years. After making allowance for usual contingencies, the assessment was probably based on a life expectancy of less than ten years. Since the learned trial judge had held that the injuries sustained by the plaintiff in the instant case were more serious than in the other but awarded only $5,000 more, it is more than probable that he based the assessment on a life expectancy of about ten years. That in my opinion would have been reasonable for it is clear from the medical evidence that despite a life expectancy of 20 to 25 years envisaged by the doctor, he was in constant peril of death at any time through infection of the bladder and kidney owing to the nature of the physical disabilities suffered by him or through an attack of pneumonia.

It is clear on the face of the record that the sum of $1,305 awarded to account of special damages for loss of earnings was calculated up to the end of July 1965 and a further sum of $620 should be added to the total award of $3,845 in respect of special damages in order to bring that account up to the date of the plaintiff's death.

Taking the sum of $70,000 as a reasonable award for loss of amenities on the basis of a life expectancy of ten years, the amount invested to bear interest at 5% per annum would have purchased an annuity of $9,090 or a monthly income of about $755 over that period.

The award for general damages for the period of 19 months should be reduced to a sum of $14,345 at the rate of $755 per mensem. To this sum must be added a sum of $3,500 for loss of expectation of life and a sum of $4,465 being special damages and from the total a deduction of 25% must be made to account of contributory negligence. The net result would be $16,732.50.

In the result the appeal will be allowed with costs. The so-called cross-appeal as indicated earlier is dismissed with costs. The amount awarded by the High Court as damages in the sum of $113,845 is hereby reduced to $16,732.50, being a sum of $13,383.75 in respect of general damages and a sum of $3,348.75 in respect of special damages.

Azmi C.J. (Malaya) and **Pike C.J. (Borneo)** concurred.

Appeal allowed.

Solicitors: *Joseph & Son; Laycock & Ong.*

SEOW KIM KOI v. WEI YIN CHEN

[O.C.J. (Choor Singh J.) August 27, 1968]
[Singapore — Suit No. 463 of 1967]

Landlord and Tenant — Controlled premises — Sub-letting — Agreement providing rent less than that actually paid by sub-tenant — Whether oral evidence could be introduced to show that agreement was a sham — Whether amount paid was standard rent of sub-let portion — Control of Rent Ordinance (Cap. 242), s. 3(4)

Evidence — Evidence to show terms of tenancy agreement were fictitious and a sham — Whether allowable — Evidence Ordinance (Cap. 3), ss. 92 and 93.

This was an action by the plaintiff to recover from the defendant the sum of $9,230 under section 3(4) of the Control of Rent Ordinance stated to be excess rent paid by the plaintiff to the defendant over a period of 71 months at the rate of $130 per month.

The defendant, a tailor was the chief tenant of No. 190 Orchard Road (hereinafter referred to as the premises). He paid a rent of "slightly more than $100 per month" to his landlords the Singapore Cold Storage Co. Ltd. Until November 4, 1960 the defendant carried on a tailoring business on the ground floor of the premises and resided with his family on the first floor of the premises. In October 1960 the defendant decided to sub-let the ground floor of the premises to the plaintiff at $230 per month but the agreement entered into between them and prepared by a solicitor stipulated the rental for the sub-let ground floor of the premises as $100 per month. It was in evidence that the plaintiff had been paying the defendant $230 per month since the commencement of the sub-letting.

Held: (1) the rental stipulated in the tenancy agreement namely $100 per mensem was a fictitious rent and was not intended to operate as the agreed rent but was inserted to create evidence for some other purpose namely to protect the defendant against eviction by his superior landlord the Singapore Cold Storage Co. Ltd.;

(2) section 93 of the Evidence Ordinance does not preclude a party from showing that the writing in question was not really the contract between the parties but was only a fictitious or colourable device to cloak something else. Oral evidence is admissible to show that what purports to be an agreement was only a sham and was not intended to be acted upon. On the authority of *Tygaraja Mudaliar's* (2) case the defendant was entitled to show by oral evidence that the rent of $100 per mensem stipulated in the tenancy agreement was not to be acted upon and he had successfully done so;

(3) as the ground floor of the premises was let for the first time at the rental of $220 per mensem, it was the standard rent of the premises and the defendant was entitled to receive the sum as lawful rent unless and until it was varied by the Rent Conciliation Board.

Cases referred to:—

(1) *Pertab Chunder Ghose* v. *Mohendra Purkait & Ors.* (1889), L.R. 16 I.A. 233, P.C.

(2) *Tygaraja Mudaliar* v. *Vedathanni* [1936] M.L.J. 79, P.C.

(3) *Pym* v. *Campbell* 6 E. & B. 370.

(4) *Mattayappan* v. *Palani Gaundan* (1913), I.L.R. 38 Mad. 226.

CIVIL SUIT.

N. A. Christopher for the plaintiff.

R. E. Redrup for the defendant.

Choor Singh J.: In this action the plaintiff sought to recover from the defendant under section 3(4) of the Control of Rent Ordinance (Cap. 242) the sum of $9,230 stated to be excess rent paid to the defendant over a period of 71 months at the rate of $130 per mensem.

The facts are these. The defendant who is a tailor by occupation is the chief tenant of premises known as No. 190 Orchard Road, Singapore, which belongs to the Singapore Cold Storage Co., Ltd. to whom he pays a rental of "slightly more than $100 per mensem." Until the 4th of November 1960 he carried on a tailoring business on the ground floor of the premises and resided with his family on the first floor of the premises. In October 1960 as business was bad and he had a large family to support he decided to sub-let the ground floor of the premises and to carry on his business on the first floor. He instructed his employee Loke Chee Hoong to find a sub-tenant for the ground floor. Loke introduced the defendant to the plaintiff who agreed with the defendant to take the ground fioor on a rental of $230 per mensem. The plaintiff and the defendant went to a solicitor's office where instructions were given for the drawing up of a tenancy agreement which is Exhibit A.B.1. The facts narrated so far are not in dispute. The dispute is as to what happened in the solicitor's office and strangely enough neither party has thought fit to call the solicitor Mr. P. Y. Tan, who drew up the tenancy agreement (Exhibit A.B.1) and witnessed its execution by the parties.

The plaintiff's version was as follows. The instructions to the solicitor were given in his presence. The solicitor asked the defendant what rent he was paying to his landlord, the